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IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1964

No.

JAMES R. BULLOCK

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

There were no reports of the trial court's decisions.

The Decision of the Supreme Court of Appeals of Virginia has been reported in the advance sheets as *Bullock* v. *Commonwealth*, 205 Va. 867. A copy of said opinion appears in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Appeals of the Commonwealth of Virginia was entered on March 8, 1965; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

Whether the protection guaranteed an accused pursuant to the Fifth Amendment of the Constitution of the United States was violated and therefore constitutes a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, wherein he is forced to stand trial over his objection based on a plea of former jeopardy, while a petition for a Writ of Error is pending and undecided in the Supreme Court of the State, of the first judgment of conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private

property be taken for public use, without just compensation.

Fourteenth Amendment, Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At the September 1963 Term of the Grand Jurors of the Commonwealth of Virginia, in and for the City of Norfolk, two indictments were returned against the petitioner herein; the second count of the first indictment being as follows:

"That the said James R. Bullock. alias James Reginald Bullock, to-wit, on the 30th day of January, 1962, in the said City of Norfolk, then and there unlawfully and feloniously did utter and attempt to employ as true a certain writing, to-wit, a promissory note, in the sum of to-wit, $1596.00, No. 12217, dated 1-30-1962, payable to the order of The Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Daniel Bigelli and Francis Bigelli, as makers thereof on the face thereof, which said purported

signatures of the said Daniel Bigelli and Francis Bigelli, are forgeries, he, the said James R. Bullock, alias James Reginald Bullock, at the time, aforesaid, that he did so utter and attempt to employ as true the said last mentioned writing, to-wit, said promissory note, well knowing the said signatures thereon to be then and there forged, and well knowing the names of said Daniel Bigelli and Francis Bigelli, purporting to be signed thereon as makers thereof, to be in fact forgeries, and with intent then and there unlawfully and feloniously to defraud, against the peace and dignity of the Commonwealth of Virginia."

The second indictment charged as follows:

"That James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962, in the said City of Norfolk, to-wit $1,596.00 of United States currency of the value of, to-wit $1,596.00 of the goods, chattels and moneys of Seaboard Citizens National Bank of Norfolk, Norfolk, Virginia, then and there being, then and there feloniously did steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia."

Upon the first indictment so found, the petitioner was tried in Corporation Court, Part Two of the City of Norfolk, Virginia and at the conclusion of the trial, upon his plea of not guilty, the jury returned a verdict of guilty and imposed a sentence of twelve months in jail upon each count of the indictment.

Subsequently, the petitioner was granted a Writ of Error and Supersedeas by the Supreme Court of Appeals of the State of Virginia on the 23rd day of April, 1964.

Prior to the scheduled date of trial upon the second indictment, the Commonwealth's Attorney, pursuant to a

request of counsel for the petitioner, stated in writing that he would rely upon Section 18.1-118 of the 1950 Code of Virginia, as amended, in asking for a conviction on the aforesaid indictment (App. 4a).

At the date of trial of petitioner, upon the second indictment on the 14th day of January, 1964, prior to the impaneling of the jury, petitioner filed a written plea of Autrefois Convict (App. 4a), wherein he set forth that the conviction on the second count of the first indictment was a bar to his prosecution on the second indictment, and alleged that the indictment then pending was for the same offense as set forth in the second count of the first indictment, in that the evidence necessary to support a conviction on the then pending indictment, was the same evidence relied on to support a conviction on the second count of the first indictment; and in support thereof he averred that the date set forth in both indictments was identical, that the amount of money was identical in both indictments, and that the person or firm alleged to be defrauded in the present indictment, was the same person or firm brought forth by the evidence in the previous trial as being the person or firm to whom the forged promissory note was allegedly uttered, and from whom the money mentioned, the sum of $1,596.00, was obtained.

During the course of the argument on the petitioner's plea of Autrefois Convict the following soliloquy took place between Court and counsel (R 8-12):

Mr. Reid: If your Honor please, at this time I would like to submit a plea of former conviction.

The Court: All right, sir. Mark it filed.

Let the record show that the Defendant is present with Counsel, and that this hearing is not in the presence of any of the prospective jurors.

I see in paragraph 4 that the Commonwealth will rely on Section 18.1-118 of the 1950 Code of Virginia, as amended, paragraph 4 stated that the Commonwealth Attorney will rely on the 118 Code of Virginia.

Have you filed it in writing:

Mr. Whitehurst: No, sir. I will ask leave to file it as Mr. Reid mentioned.

The Court: When was the request made?

Mr. Reid: Request was made yesterday.

The Court: You will file that, Mr, Whitehurst; and that is the section you are relying on?

Mr. Whitehurst: 18.1-118.

The Court: This Exhibit A here you filed is a copy of the indictment on which the Defendant has been convicted?

Mr. Reid: Yes, sir.

The Court: Under this indictment, the first count, the forgery, and the second, the uttering?

Mr. Reid: Yes, sir.

The Court: And your contention is that the Defendant, having been convicted under this indictment and more especially the second count of uttering, that the Defendant cannot now be tried for grand larceny of the amount alleged in this indictment, is that right?

Mr. Reid: Yes, sir.

The Court: I have read it and I understand the plea. I think I understand your position. Have you anything further you wish to offer?

Mr. Reid: Except by way of argument, Your Honor.

The Court: All right, sir.

Mr. Reid: If Your Honor please, under the old section 18-233—

The Court: 18-233?

Mr. Reid: It's been deleted under the new code section of 1960, and appears under section 19.1-259.

The Court: That is offenses against two or more statutes or ordinances?

Mr. Reid: Yes, sir.

If your Honor please, as set forth in the annotations, the section was originally enacted to relieve the hardship that was established by the opinion of the Court in the case of Arrington versus the Commonwealth.

In that particular case—

The Court: What is that citation?

Mr. Reid: 84 VA 96, 12 SE 224.

In that particular instance—

The Court: That is in the footnote you are referring to?

Mr. Reid: Yes, sir.

The Court: What is the section?

Mr. Reid: 19.1-259.

The Court: Go ahead.

Mr. Reid: In that particular instance, the accused was on trial for the sale of liquor without a license. At that trial, he filed a plea of former jeopardy on the basis that on facts arising out of the same offense, he has been convicted of the sale of whiskey, liquor on Sunday. The Court said that they were two separate and distinct offenses. That had been the law up until the enactment of this particular section, which in the old code was 19-232.

At the present time, it is designated 19.1-259.

We still have, of course, the situation where one act can in fact constitute two separate crimes.

If that be true, then pleading acquittal of a former conviction of one would not necessitate the fact that he would have to be acquitted of the other, which is in a situation of driving under the influence and reckless driving.

For there, of course, a man can be driving under the influence without necessarily driving recklessly, but here, we have one situation.

The accused has been convicted under the second count of the first indictment of uttering a deed of trust note or promissory note, I believe is the way it is described in the indictment. The date set forth in that is the same date that is set forth in the present indictment which alleges larceny. The amount of money set forth is the same amount of money. The person named in both indictments or the firm or banking establishment named is the Seaboard Citizens National Bank of Norfolk. The present indictment alleges that that was the banking institution from whom the funds were supposedly procured by fraud and deceit; and in this particular instance, referring to Michie's Jurisprudence, Section 16, which sets forth the general rule states as follows:

> "It is stated that the test is whether the evidence necessary to support the second indictment would have been sufficient to produce a legal conviction upon the first."

In applying that as it is to the present situation at hand, the evidence pursuant to the section Mr. Whitehurst stated he was relying on, he must first show there was fraud. The only fraud he can show is that the signatures on this note were forgeries.

Secondly, he will have to show that the note was negotiated. Thirdly, he received the funds. The evidence in the first case was exactly the same thing, that the note was a forgery, that it was uttered at the bank, and the evidence in the first trial conclusively shows that the inducement from the Commonwealth's Attorneys, adduced from the witnesses that the money was paid, so consequently at this trial of this, the only way he can produce evidence sufficient to convict would necessarily have to follow that it would also sustain a conviction of uttering, the same instance of which he has already been convicted.

Quoting further, it says: "If the fact it will convict on the second prosecution will not necessarily have convicted on the first, the first will not necessarily be a bar," but the situation we have here is that the facts that convicted would also have to be sufficient to convict on uttering in the same instance.

The man has been put in jeopardy for this, and has been found guilty by the jury. That being so, we submit to the Court that it is double jeopardy to have him go to the trial for the same act at this time.

The Court: You don't have to have a larceny, though, to have the elements of uttering, do you?

Mr. Reid: No, sir, but that is not the rule.

The Court: You don't have to have the elements of uttering to prove a larceny?

Mr. Reid: You do not, however, here we are talking about this one act. That is what this former jeopardy is aimed at, but what the rule says is the fact that if the evidence at the second trial arising out of this same act would be sufficient to procure a legal conviction upon the prior indictment, then it is former jeopardy.

The Court: All right, sir.

Mr. Reid: That was Henson versus the Commonwealth, 165 VA 829, 183 SE 438. Here again, it says, "See Commonwealth versus Davis," 17 VA Law Register 509, and it also sets forth the general rule that identical charge is established when it shows that the same proof will support both. "Short versus U.S." which was a Virginia decision, 91 Fed. 2d 614.

Citing further, Your Honor, from 15 Am. Jur., 53, Section 380, Criminal Law, on the question of former jeopardy, it cites the heading of the paragraph, states it necessitates that the second trial be for the same act and crime.

> "The common law rule of constitutional provision declaratory thereof against the second jeopardy apply only to the second presecution for the same act, apply only in law, in fact, in which the first prosecution was instituted."
>
> "This does not, however, mean former technical, absolute identity. Substantial identity is sufficient. The fact that some single element of the offense charged may have some single element of some other offense as to which the Defendant has previously been in jeopardy is not sufficient to support a former plea of jeopardy," which is quite true.
>
> "It must appear that the Defendant on the first charge could have been convicted upon the offense in the second, but the term second offense or same offense is meant not only the same offense in its entirety and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment."

In this situation, particularly, the ruling in Virginia as set forth in Michie's Jurisprudence, I suggest this situa-

tion falls completely into. The evidence that would have to be produced now as a matter of necessity would have to support a conviction on the uttering indictment.

The Court: All right, sir, you are through?

Mr. Reid: Yes. sir.

The Court: Mr. Reid, this does not give me much trouble, this section 19.1-259 applies only, I think, in situations of state statutes and municipal ordinances. I think that larceny is defined as a separate and distinct act from forgery or from uttering, and it would not be the same act or the same crime in law and in fact as the first trial.

There is no conceivable way that the Defendant could have been convicted of larceny on an indictment charging forgery and uttering. I hold that larceny is a separate and distinct offense, and that double jeopardy would not be involved in a trial of this second indictment since the first indictment merely contained counts of forgery and uttering, to which you except."

Subsequent to the Court's action in overruling petitioner's plea of Autrefois Convict, a jury was impaneled and at the conclusion of the evidence, and the overruling af petitioner's motions by the Trial Court the jury's verdict sentencing petitioner to three years in the state penitentiary was entered.

On petitioner's motion a stay of execution of the judgment was entered by the Trial Court, and subsequently, upon petitioner's petition to the Supreme Court of Appeals of Virginia, a Writ of Error and Supersedeas was awarded on the 11th day of June, 1964.

REASONS FOR GRANTING THE WRIT

The major subject of review by the Supreme Court of Appeals of Virginia in the case at bar was whether an accused could be convicted of uttering a forged instrument, and after such conviction be tried under an indictment for obtaining money by false pretenses, over his objection; where the same identical evidence that was necessary to support the first conviction would have to be introduced in order to support a conviction under the second indictment; and where the two indictments were carved out of one continuing and uninterrupted set of facts.

However, the situation became more complex when the first conviction, which was the subject of an undecided appeal at the time of the second trial, was reversed and remanded to the trial court on the basis of reversible error committed by the trial court relating to a prejudicial instruction; subsequent to the granting of a Writ of Error and Supersedeas after the second conviction.

It is well to note that the question of whether an undecided appeal can be successfully pleaded as a former jeopardy under the terms of the Fifth Amendment to the United States Constitution was not decided by the Supreme Court of Appeals of Virginia, nor was the subject even considered.

From the foregoing, petitioner's argument will be divided into two subjects, and submitted for the consideration of the Court in the order listed:

1. Whether, when the facts of the two indictments which are the subject of this petition are present, an accused can be convicted of uttering a forged instrument, and of receiving the funds represented thereby by false pre-

tenses, when the factual situation constitutes one continuous act; or conversely, does a prosecution under the first indictment constitute a jeopardy, and, as such, bar the subsequent prosecution of the second indictment?

2. Does a pending appeal from a prior conviction constitute such a final judgment to allow it to be successfully pleaded as a former jeopardy to a pending indictment, pursuant to the Fifth Amendment to the United States Constitution?

The basic facts relied on by the prosecution in both cases are quite simple, and for all intents and purposes, identical as to both the testimony and the witness; and are taken from the testimony of Detective E. W. White of the Norfolk, Virginia police force. The testimony of the witness at the first trial of the petitioner on October 16, 1963; *Bullock* v. *Commonwealth* 205 Va. 558, 138 S.E. 2d 261, (R(5876)19), was as follows:

By Mr. Whitehurst:

Q Detective White, what are your initials?

A E. W.

Q E. W. White. You are a detective in the Norfolk Police Division, assigned to the check squad; is that correct?

A That's correct.

Q Detective White, in reference to this case, did you talk to the defendant, James R. Bullock?

A Yes, sir, I did, on August 6th, this year.

Q And were his statements in reference to these matters voluntary on his part?

A It was.

Q What was discussed and said about the transaction?

A We discussed the note—notes that are in evidence here and I inquired of him as to the signatures on the notes. He said the signature of "Bullock", which appears to the bottom of the names of the Bigellis, were his but the other two signatures were not his. He said he first saw these notes on his desk at his business over at the Heath Auto Sales which he operated.

Q Yes, sir.

A He said he negotiated the notes at the Seaboard Bank in Berkley.

Q Said he negotiated the notes himself?

A Yes, sir.

Q All right, sir.

A I asked him, did he receive the proceeds from the notes, and he said, yes, with some of it going into a reserve account that he had at the bank.

Q All right, sir, go ahead.

A He said that he knew, when he negotiated the notes, that they had not been signed by the Bigellis and he knew that they were phony, that the papers were phony.

Q Is that at the time of the negotiation of the notes?

A Yes, sir."

The testimony of the witness at the second trial of the petitioner on January 14, 1964; *Bullock* v. *Commonwealth*, 205 Va. 867, 140 S.E. 2d_____, (R(5938)24-25), was as follows:

Examined by Mr. Whitehurst:

"Q State your name, please. ...

A Detective E. W. White, with the Norfolk Police Department.

Q And your present assignment was?

A With the check squad, Detective Bureau.

Q You are in charge of the check squad?

A Yes, sir.

Q In reference to this particular case, did you have occasion to talk to the defendant?

A Yes, I did, on August 6, of 1963.

Q If you would start and relate what your conversation was, sir, and how it took place?

A Well, I first saw him at the Berkley Branch of the Seaboard Bank, approximately 11:00, 11:15, in the office of the Vice President of the bank, Mr. Koonce's office.

There was a discussion carried on between Mr. Koonce, the attorney for the bank, and Mr. Bullock in the presence of Detective Rawls and I, and also present were Mr. and Mrs. Bigelli.

The note was in question, bearing the signatures of the Bigellis and Mr. Bullock had offered to make payment by check, did write a check there for the balance owing on this note.

When asked about the signatures of the Bigellis there, he stated he did not write them, but he would be responsible for them.

From there we went to my office in the Police Headquarters Building, the Detective Bureau. There I talked to Mr. Bullock again. He stated that he owned and operated the Heath Auto Sales at 415 Campostella Road in the City of Norfolk, that the signature on this note which bore his name, that he signed.

* * *

A Yes, sir. He stated he signed his name to this note after the name of Daniel and Francis Bigelli, was

already signed to it, that he negotiated this note with the Seaboard Bank in the Berkley Branch, he received the proceeds, that he knew the note was phony° ° ° °."

ARGUMENT

1. Whether, when the facts of the two indictments which are the subject of this petition are present, an accused can be convicted of uttering a forged instrument, and of receiving the funds represented thereby by false pretenses, when the factual situation constitutes one continuous act; or conversely, does a prosecution under the first indictment constitute a jeopardy, and, as such, bar the subsequent prosecution of the second indictment?

In the decision presently complained of, the Supreme Court of Appeals of Virginia unqualifiedly held that the acts relating to the two indictments did not constitute the same offense, and in support of its contention stated that the matter had been decided in *Bateman v. Commonwealth*, 205 Va, 595, 139 S. E. 2d 102.

It is submitted that the decision in *Bateman* cannot be, when the facts of the case are considered, deemed analogous to the situation present in the case at bar. The Commonwealth in *Bateman*, in what has become the common practice, included four counts in each indictment, at least two of which constituted identical offenses, and proceeded to present the evidence and allow the jury to fit the evidence into the framework of the applicable counts presented. Bateman was tried, without objection, on eight indictments, each of which included four counts, ie, forgery, uttering, larceny of the amount of the check involved from the maker of the check, (In this instance the checks were signed by the maker, however, they were

altered before presentment and payment.), and larceny of the amount of the check from the banking institution to which they were presented for payment. The defendant was found guilty under three counts of two of the indictments, ie, forgery uttering and larceny (pursuant to Section 18.1-118 of the 1950 Code of Virginia, as amended, App. 4a) from the maker of the check, *and not from the person to whom the instrument was uttered.*

At the second trial of the petitioner, he offered a special plea of former jeopardy based on a prior trial and conviction for uttering a supposedly forged instrument. He then contended that he was being brought to trial on an indictment charging him with receiving the money represented thereby by false pretenses from the same person or firm to whom the instrument was supposedly uttered, and all of which, pursuant to the evidence in both cases, took place at the same time. He further contended that even if the evidence was sufficient to support a conviction in either case, both instances occurred out of one and the same set of facts. This situation was not before the trial court for direct ruling in *Bateman,* nor was it considered by the Supreme Court of Appeals of Virginia in that decision.

The complexity of this situation is cogently set forth in *Lawrence* v. *Commonwealth,* 181 Va. 582, 26 S.E. 2d 54, wherein the Court stated as follows:

> "Courts are in hopeless conflict when it comes to the solution of the problem of the identity of offenses. *State* v. *Fredlund,* 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 220. And cases dealing with that subject are almost unnumbered."

The decision of the Supreme Court of Appeals of Virginia is completely adverse to the applicable Virginia rule

wherein a plea of Autrefois Convict is concerned, and which follows a decided majority rule, as set forth in *Henson* v. *Commonwealth,* 165 Va. 829, 183 S.E. 438, p. 439, wherein 8 R.C.L., page 143, is quoted with approval as follows:

> "The prohibition of the ancient principal of the common law and the constitutional provisions declaratory thereof, against the second jeopardy, apply only to a second prosecution for the identical act and crime both in law and fact for which the first prosecution was insituted. In determining whether both indictments charge the same offense, the test is generally applied that when the fact necessary to convict on the second prosecution would necessarily have convicted on first, the final judgment on the first prosecution will be a bar to the second, but if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed by the same state of facts. Stated in another form, if there was one act, one intent and one volition, and the defendant has been tried on the charge based on such act, intent and volition, no subsequent charge can be based thereon, though the crimes involved in the two proceedings are entirely different."

This rule is approvingly cited in 15 *Am. Jur., Criminal Law,* Section 380, page 56. See also *Short* v. *United States* (Va.) 91 F. 2d, 614.

A similar, if not identical, ruling is set forth in 16 *Federal Practice Digest, Criminal Law,* 196, page 318, citing *United States* v. *McGee,* 117 F. Supp. 27, as follows:

> "If evidence which is necessary to support second indictment is admissable under first indictment, and is related to same crime, and is sufficient if believed by

jury to have warranted conviction of first crime, offenses charged in first and second indictment are identical, and plea of former conviction or acquittal is bar to prosecution under second indictment, but if facts which will convict on second prosecution would not necessarily have convicted on first, the first prosecution will not bar second, although offenses charged may have been committed in same transaction."

The Supreme Court of Appeals of Virginia, in effect, also ruled that the two offenses herein complained of were not carved out of one set of facts, and did not constitute a continuing crime; where it ruled that petitioner's plea, pursuant to Section 19.1-259 of the 1950 Code of Virginia, as amended, (App. 8a), was not validly made.

In this instance the Supreme Court of Appeals of Virginia held that the evidence necessary to support a conviction for uttering a forged instrument, would not be the same as the evidence necessary to support a conviction for larceny. Conceding for the sake of argument that this is true, it has no bearing whatsoever on the issue as presented to the Court. Upon the second indictment the Commonwealth elected to proceed under Code Section 18.1-118 (App. 4a), which is not, by any stretch of the imagination, a codification of the common law crime of larceny.

Here there were two statutes involved; Section 18.1-96, Forgery and Uttering, and Section 18.1-118, Obtaining Money by False Pretenses. The acts which were necessary to accomplish the end which the Commonwealth offered evidence in an attempt to establish, are the same in both instances, which would violate both of the foregoing statutes; and the plea of a conviction of the first is a bar to a prosecution for the latter. Secondly, the rule of distinction between the supposed offenses, as arrived at by the trial

court, is equally erroneous. The Commonwealth elected to seek a conviction pursuant to Section 18.1-118 which is the specific crime of obtaining money by false pretenses, and not common law larceny; the statute states, " * * * he shall be deemed guilty of the larceny thereof; * * *"; it merely makes obtaining money by false pretenses equivalent to larceny, and sets forth what is necessary to constitute the offense.

It is earnestly submitted that the present trend is to circumvent by any devious means or play of words, through the never ending attempts on the part of the courts to effectuate rules upon which they can state that the plain and unconfusing language of the Fifth Amendment, to the United States Constitution, which is prohibitively cast upon the states by the Fourteenth Amendment, is not applicable to a given set of circumstances; in order to prevent any individual from effectively utilizing what is rightfully declared his. This problem has long been recognized by this Court, as appears from the decision in *Short* v. *United States, supra;* where the Court quoted from the opinion in *Murphy* v. *United States,* 285 F. 801, where the defendant was under a conspiracy to hold up and rob a United States Mail truck, and to conceal the stolen property taken therefrom, and where two separate, substitive offenses were created by statute; as follows:

> "The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demands a test which is practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine the issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution."

In an untiring and never ending attempt to codify every conceivable crime, the legislators, both federal and state, have enacted statutory crimes which can virtually be applied to any given set of circumstances; and in so doing, have forced persons accused of crime to beg protection to be relieved of the necessity of submitting to trial after trial for the same act, through the Fifth Amendment to the Constitution.

In *Munson* v. *McClaughry* (8th Circuit) 198 F. 72, 76, 42 L.R.A., N.S., 302, the defendant had been convicted on two counts; one for burglary of a post office with intent to commit larceny, and the second for larceny committed therein at the same time. After serving the sentence imposed on the first, after which the second was to commence, upon his application for release on habeas corpus, it was held that the sentence to separate punishment for larceny was void, and that he was entitled to release. Quoting from the opinion:

> "The highest judicial tribunals of Massachusetts, Kentucky, Pennsylvania, and Georgia have decided that burglary with intent to commit larceny and larceny at the same time and as a part of the same transaction may not be lawfully punished as separate offenses, because they are parts of a single continuous act inspired by a single criminal intent. * * *
>
> The United States Circuit Court of Appeals for the Ninth Circuit, after a thoughtful review of the authorities, has decided that, where one is indicted in separate counts and convicted of burglary of a post office with intent to commit larceny under Section 5478 (18 U. S. C. A. Section 2115), and of larceny at the same time as a part of the same transaction under section 5456 or 5475 (18 U. S. C. A. Sections 2112, 1707), he can be lawfully punished for the burglary only. Halligan v. Wayne, 179 F. 112, 102 C. C. A. 410.

> And because in such a case the burglary and larceny are parts of a single continuous act, inspired by the same single criminal intent, provable by the same evidence, because the arbitrary subdivision of such a single criminal act, inspired by the same criminal intent, into numerous offenses, is unauthorized and oppressive, because, after conviction of such a burglary, the subsequent trial for such a larceny in reality puts the defendant twice in jeopardy for the same criminal act and intent, and because this decision of the court of the Ninth Circuit is sustained by the eminent authority of its judgment and by the stronger and better reasons, its conclusion is followed and adopted by this court."

The *Munson* case was followed by *Stevens* v. *McClaughry*, 207 F. 18, 30 51 L.R.A., N.S., 390, wherein the Court held that a sentence was void as to its excess above the maximum that could be imposed for a single offense, where the defendant had been convicted under a two count indictment charging larceny of a mail pouch, and larceny of four registered letters containing money, and embezzlement of their contents. The Court, citing *Munson* v. *McClaughry*, *supra*, and the cases therein cited, stated:

> "The principal upon which the decisions in these cases rests, is that two or more separate offenses which are committed at the same time and are parts of a single continuing criminal act inspired by the same criminal intent which is essential to each offense, are susceptible to but one punishment."

In *State* v. *Hollman* (Supreme Court of South Carolina), 102 S.E. 2d, 873, where the defendant was convicted of resisting an officer and of assault and battery of a high and aggravated nature, the Court reviewed the cases last cited in holding that the conclusion was inevitable that the

assault on the officer was the essence of, and inseparable from, defendant's resist of arrest, and that the offense was essentially and substantially a singular one, and the defendant could not be convicted of both offenses and punished for each separately. The Court in reviewing additional cases, both federal and state, on this same question, stated on page 883:

> "It is oversimplification to say that 'the test of identity of offenses is whether the same evidence is required to sustain them'. That test is, as was said in *State* v. *Switzer, supra,* useful and generally adequate. But it must be reasonably applied; inflexible literality in its interpretation can lead to absurdity. For example, in *State* v. *Switzer, supra,* (65 S.C. 187, 43 S.E. 514), evidence that the storehouse was "within the curtilage" was not required to sustain a conviction under the second indictment;[1] in *State v. Dewees, supra*[2], evidence of the amount of money embezzled, and of the date of the offense, varied under the two indictments; and in *State* v. *Mitchell, supra*[3], evidence of breaking as well as entering was required under the first indictment, but not under the second; yet in each of those cases the prosecution under the second indictment was held double jeopardy.
>
> The test above stated must, too, be considered in the light of the settled rule of law, to which we have already referred, that where the offense is essentially and substantially a single one the state cannot divide it into two or more offenses and punish for it separately."

[1]Defendant was acquitted under an indictment charging attempted arson of a storehouse within the curtilage and subsequently indicted for an attempt to set fire at the same time, to the same building, which in the latter indictment was not alleged to have been in the curtilage.

[2]76 S.C. 72, 56 S.E. 674

[3]97 S.C. 474, 82 S.E. 676

On the question of carving out multiple offenses, the Supreme Court of Appeals of Virginia in *Campbell* v. *Commonwealth,* 201 Va. 507, followed the generally prevailing rule:

> "Where one act constitutes several crimes there may be a separate prosecution for each crime. But the state cannot split up a single crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime."[4]

In *Campbell* v. *Commonwealth, supra,* wherein Campbell was charged under two indictments; the first for felonious assault by striking an officer with a revolver, and the second for feloniously shooting the officer with the revolver; the facts revealed that the officer was struck, and some thirty seconds to a minute later, while still in a dazed condition, was shot by the accused. The Court in holding that a single crime was committed which could not be split and prosecuted into parts to convict of more than one offense, quoted *Rogers* v. *Commonwealth,* 257 Ky. 495, 497, 78 S.W. 2d, 340, as follows:

> "* * * But in administering, construing, and applying that maxim (nemo bis punitur pro eodem delicto) as it existed at common law and as inserted as a part of our Bill of Rights in our Constitution, it has long been judically declared that the prosecution may not split up a set of facts and carve out of them multiple offenses (statutory or otherwise) by founding or basing them on parts of an entire set of facts, and which parts are necessary ingredients and elements of the offense as embraced by the entire facts."

Considering the foregoing, which appears to be supported by the decided weight of authority, it is submitted

[4]Referring to *United States* v. *Buckner,* 37 F. 2d 378, 381.

that this same rule governs in this case; and that the Supreme Court of Appeals of Virginia denied the accused's constitutional guarantees in upholding the trial court's decision on his plea in bar, as provided by Section 19.1-259 of the 1950 Code of Virginia, as amended, (App 8a.)

2. Does a pending appeal from a prior conviction constitute such a final judgment to allow it to be successfully pleaded as a former jeopardy to a pending indictment, pursuant to the Fifth Amendment to the United States Constitution?

Petitioner was tried on one of three indictments returned at the September term 1963 in the City of Norfolk, Virginia, on the 16th day of October, 1963; the indictment consisting of two counts, one for forging a negotiable promissory note, and the other for uttering the same. Upon his petition to the Supreme Court of Appeals of Virginia a Writ of Error and Supersedeas was granted. Subsequently, on the 14th day of January, 1964, he was brought to trial, over his objection based upon his contention that the second count of the first indictment under which he was convicted, (uttering the negotiable promissory note), constituted both a prior jeopardy, and a trial and conviction pursuant to Section 19.1-259 of the 1950 Code of Virginia, as amended (App. 8a); contending that the same act constituted a violation of two statutes, while the first appeal was still pending and undetermined.

The Virginia appellant court in its final determination on petitioner's plea of former jeopardy, cited a case and authorities which support a decided majority view, wherein the application of the rule therein stated is applicable. However, neither the rule, nor the factual situation upon

which it is predicated, is applicable in the instance of the petitioner's case.

The general rule, supported by a decided majority, is to the effect that a person convicted of a crime waives his constitutional protection against being put twice in jeopardy and may be tried again, where a verdict against him is set aside and a new trial granted on his motion in the trial court, or a conviction is reversed on appeal or error proceeding instituted by him. (15 *Am. Jur., Criminal Law,* Section 427, p. 89). The Supreme Court of Appeals of Virginia also cited *Cross* v. *Commonwealth,* 195 Va. 62, 63, 77 S.E. 2d 447, 448, wherein it is stated:

> "Where accused is convicted of offense and applies for and obtains new trial, he thereby waives his former jeopardy and subjects himself to further prosecution for the same offense, and therefore, where defendant successfully sought reversal of judgment of conviction, and appellant court remanded case for new trial if Commonwealth be so advised, defendant's plea of former jeopardy *on new trial* was without merit." (Emphasis added)

Although this rule is very well established[5], the basis for the application of the same was non-existent at the time of the second trial. As hereinabove stated, the question presented and argued was as to the effect of a then pending and undecided appeal at the time the petitioner was forced to stand trial under the second indictment; for at that time the decision had not been reversed and remanded for a new trial; nor was it reversed at the time of the granting of a Writ of Error and Supersedeas by that same Court upon conviction under the second indictment.

[5]See *Forman* v. *United States,* 361 U.S. 416, p. 425, 4 L. Ed. 412, 80 S. Ct. 481.

Regretfully, the authorities are not in complete accord on this question; and some decisions are contrary to what petitioner submits to be the only reasonable conclusion when viewed in light of the constitutional guarantee involved.

In 15 *Am. Jur., Criminal Law*, Section 376, p. 51, the following rule is stated:

> "Under a voidable judgment of conviction the defendant is in jeopardy, and such judgment is a bar to further prosecution on the same facts for the same or a higher offense necessarily including the former, until such judgment is reversed or set aside." (Citing *People* v. *Ny Sam Chung*, 94 Cal. 304, 29 P. 642, 28 Am. St. Rep. 129.)

A view to the contrary has been taken by the Texas Supreme Court, as is shown by *Dupree* v. *State*, 56 Tex. Crim. Rep. 562, 120 S.W. 871, and is the subject of an annotation in 23 L.R.A. (N.S.) 596; wherein it is stated that where a conviction has been appealed from and the appeal is still pending, the defendant may be again tried for the same offense without violating his right as to jeopardy. The annotation of this matter is quite interesting and lends no support whatsoever to this position. It would first appear that there is a great question as to whether the second indictment in that case was in fact for the same offense, however, this becomes moot in light of the other cases cited. It is noted that *Dupree* was approvingly followed by *Harvey* v. *State*. 57 Tex. Crim. Rep. 5, 121 S.W. 501, wherein it was stated that there is ample authority for the position, however, there are no authorities given in that report. Secondly, the annotation indicates that there are but few authorities reported upon the question of the effect of the

defendant's taking an appeal from a conviction upon his right to plead the conviction as a bar to a second prosecution for the same offense, and these seem to be in direct conflict. Actually, there appears to be no other cases, at least from other jurisdictions, which expressly support this view.

In disposing of *Dupree,* it is well to note that the decision in *United States* v. *Olsen,* 57 F. 579, is directly in conflict with the Texas decisions cited above. In this case the Court, after quoting with approval a statement of Mr. Justice Clifford in *Coleman* v. *Tennessee,* 97 U.S. 509, 24 L. Ed. 1118, to the effect that a plea of former conviction is bad unless it contains the averment that the prior judgment is in full force and unreversed, said that it was not prepared to say that the defendant must also show that no appeal has been taken from the judgment pleaded at bar; and it was held that even though an appeal was pending, the defendant was not for that reason deprived of the protection of the judgment if it was otherwise sufficient. The Court also cited with approval *Bishop, Criminal Law,* Section 1021, to the effect that there can be no second prosecution while the judgment even if void is unreversed; not because there has been a jeopardy, but because an erroneous final judgment is voidable only, and of the same effect while it stands as a valid one.

A situation practically identical to that faced by the petitioner arose in *Bustamante* v. *People,* 136 Colo. 362, 317 P. 2d 885; where it was held that a defendant who has pending a writ of error based upon his conviction of embezzlement allegedly committed between certain dates may not, over his objections, be prosecuted for an alleged embezzlement on a date certain which is contained within the former period of time and which, in so far as the informa-

tions were concerned, involves the same office and funds. The Court further concluded that a conviction which is not yet final, due to its appeal, affords the defendant a shield against a second or later prosecution for the same offense pending determination of the appeal. Noting that after the commencement of the second trial, the first conviction was remanded for a new trial, the Court's ultimate conclusion was that under the circumstances stated above, a defendant is in double jeopardy where the prosecution, instead of awaiting the outcome of the first action, embarks upon a new, similar trial, while the former is still pending on appeal.

It is submitted that the petitioner's rights pursuant to the Fifth Amendment, which are brought to bear upon the individual states by the Fourteenth Amendment, were denied him, over his objection; and that there was no harmless error committed due to the fact that the first conviction was reversed and remanded. The guarantee afforded by the Fifth Amendment is unequivocably that he shall not be again placed in jeopardy; however, the decision of the Supreme Court of Appeals of Virginia here complained of is, in effect, when viewed in light of its opinion, a substitution of the jury's verdict in the second trial for the verdict that was reversed and remanded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

HERBERT S. REID, JR.
Counsel for Petitioner

Present: Eggleston, C.J., and Spratley, Buchanan, Snead, I'Anson and Carrico, JJ.

JAMES R. BULLOCK

-v-

COMMONWEALTH OF VIRGINIA

Record No. 5938

PER CURIAM

Richmond, Virginia, March 8, 1965

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK, PART TWO

Linwood B. Tabb, Judge

At the September, 1963, term of the court below James R. Bullock was indicted for the larceny of $1,596 from the Seaboard Citizens National Bank of Norfolk. Pursuant to Code (Repl. Vol. 1960), Section 18.1-109, the attorney for the Commonwealth filed a statement in writing that in asking for conviction he would rely on Code (Repl. Vol. 1960), Section 18.-118. This latter section provides that "If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; * * *."

The defendant filed a plea of *autrefois convict*, alleging that on October 16, 1963, he had been convicted in the same court of uttering at the Seaboard Citizens National Bank on January 30, 1962, a forged promissory note in the sum of $1,596; that under the present indictment he is charged with obtaining from the same bank on the same date the same amount of money by means of the same forged promissory note involved in the previous trial; and that his prior conviction "constitutes former jeopardy for

the offense which he now stands indicted" and is a bar to the present prosecution.

In support of his plea the defendant offered the record in the former case showing his conviction of forging a note in the principal sum of $1,596, and uttering it by presenting it to the Seaboard Citizens National Bank on January 30, 1962.

In the trial on the special plea the lower court held that obtaining money by false pretense, which amounts to larceny under Code (Repl. Vol. 1960), Section 18.1-118, is a separate and distinct offense from uttering a forged note for that amount. Accordingly, it overruled the defendant's special plea. Upon being arraigned the defendant pleaded not guilty. There was a trial before a jury which found the defendant guilty, as charged in the indictment, and fixed his punishment at confinement in the penitentiary for three years. Judgment was entered on the verdict. We granted the defendant a writ of error.

The main contention of the defendant on this appeal is that the lower court erred in overruling his plea of *autrefois convict*. He argues here, as he did in the lower court, that uttering the forged note for $1,596 by presenting it to the bank constitutes the same offense as obtaining that amount of money from the bank by means of the forged instrument.

We agree with the lower court that these acts do not constitute the same offense, and we so held in *Bateman* v. *Commonwealth*, 205 Va. 595, 600, 139 S. E. 2d 102, 196, decided subsequent to the granting of the writ of error in the present case.

For the same reason there is no merit in the defendant's contention that the present prosecution is barred by

Code (Repl. Vol. 1960), Section 19.1-259. The pertinent portion of this statute reads: "If the *same act* be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution of proceeding under the other or others. * * *" (Emphasis added.)

Since, as we have said, uttering the forged note in violation of Code (Repl. Vol. 1960) Section 18.1-96, is not the "same act as obtaining money by means thereof in violation of Section 18.1-118, *supra*, the present proceeding is not barred by Section 19.1-259.

The defendant's plea of *autrefois convict* must fail for another reason. It appears from the records of this court, of which we will take judicial notice (*Cunningham* v. *Hayes*, 204 Va. 841, 857, 134 S. E. 2d 271, 275, and authorizes there cited), that the judgment of conviction of the defendant entered in the court below on October 16, 1963, and upon which he relies in his special plea, was on his petition for a writ of error reversed and the case remanded for a new trial by an order of this court entered on October 12, 1964. See *Bullock* v. *Commonwealth*, 205 Va. 558, 563, 138 S. E. 2d 261, 265. Hence the prior judgment of conviction, reversed at the instance of the defendant, cannot be pleaded in bar of the present proceeding. See *Cross* v. *Commonwealth*, 195 Va. 62, 63, 77 S. E. 2d 447, 448; 22 C.J.S., Criminal Law, Section 272-a, p. 700; Id., Section 273, p. 705; 15 Am. Jur., Criminal Law, Section 427, p. 89.

We find no error in the proceedings and the judgment is

Affirmed.

* * *

1950 CODE OF VIRGINIA

Section 18.1-118. *Obtaining money or signature, etc., by false pretense.* If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than two nor more than ten years. (Code 1950, Section 18-179; 1960, c. 358.)

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PLEA OF AUTREFOIS CONVICT

TO: The Honorable Linwood B. Tabb, Judge of the Corporation Court of the City of Norfolk, Virginia,

Part Two

The accused, James R. Bullock, respectfully represents unto this Honorable Court as follows:

1. That he now stands indicted before this Court on the following indictment, to-wit:

"The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its September term, 1963, upon their oaths, present that James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962, in the City of Norfolk, to-wit, $1,596.00 of the goods, chattels and moneys of Seaboard Citizens National Bank of Norfolk, Norfolk, Virginia, then and there being, then and there feloniously did steal, take, and carry away,

against the peace and dignity of the Commonwealth of Virginia."

2. That he, the said James R. Bullock, was on the 16th day of October, 1963, tried before a jury duly impaneled before this Honorable Court on an indictment for the forgery and uttering of a certain deed of trust, note, or promissory note, a reasonable copy of the said indictment is attached hereto marked "Exhibit A" and is respectfully requested to be read as a part thereof. That at the conclusion of the said trial the jury found this defendant guilty of both counts contained in the said indictment and fixed his punishment at twelve months in jail on each of the said counts.

3. That upon the motion of this defendant, argued on the 22nd day of November, 1963, to set the jury's verdict aside as being contrary to the law and the evidence, final judgment, as aforesaid, was entered by this Court, however, upon motion of the defendant, a sixty day stay of execution was granted by the Court, to allow him to petition the Supreme Court of Appeals of the Commonwealth of Virginia, for a writ of error, and notice of appeal and assignment of error has theretofore been timely filed with the Clerk of this Honorable Court, with the requisite notice prescribed by statute.

4. That upon the request of this defendant, by counsel, the Attorney for the Commonwealth has advised that he will rely upon Section 18.1-118 of the 1950 Code of Virginia, as amended, in asking for conviction on the indictment presently pending before this Honorable Court.

5. That the said indictments presently pending before this Honorable Court is the same as the second count of the indictment tried before this Court on the 16th day of

October, 1963, in that the evidence necessary to support a conviction on the pending indictment is the same evidence relied on to support a conviction on the second count of the prior indictment. In support thereof he avers that the dates set forth in both indictments are identical, the amount of money is identical in both indictments, and the person or firm alleged to be defrauded in the present indictments is the same person or firm brought forth in the previous trial, as being the person or firm to whom the forged promissory note was uttered, and from whom the money mentioned, ie, the sum of $1,596.00, was obtained.

6. That the second count of the first indictment, and the present indictment do not set forth two separate and distinct crimes, but to the contrary, set forth the violation of two different statutes by the same act.

WHEREFORE, this defendant respectfully submits that his conviction of uttering under the second count of the first indictment on the 16th day of October, 1963, as is more fully disclosed by the record in the Clerk's Office of this Court, constitutes former jeopardy for the offense which he now stands indicted, under the present indictment, and he therefore moves that the same be relieved and discharged from any further proceedings under the said indictment.

JAMES R. BULLOCK, *by Counsel*

"EXHIBIT A"

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its September term, 1963, upon their oaths, present that James R. Bullock, alias James Reginald Bullock, to-wit on the 30th day of January in the year 1962,

in the said City of Norfolk then and there unlawfully and feloniously did forge the names of Daniel Bigelli and Francis Bigelli, as makers of a certain writing, to-wit, a promissory note, in the sum of, to-wit, $1,596.00 No. 12217, dated 1-30-1962, payable to the order of the Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Dainel Bigelli and Francis Bigelli, as makers thereof on the face thereof, to the prejudice of another's right, and with intent then and there unlawfully and feloniously to defraud against the peace and dignity of the Commonwealth of Virginia.

Second Count: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said James R. Bullock, alias James Reginald Bullock, to-wit, on the 30th day of January, 1962, in the said City of Norfolk, then and there unlawfully and feloniously did utter and attempt to employ as true a certain writing, to-wit, a promissory note, in the sum of, to-wit, $1,596.00, No. 12217, dated 1-30-1962, payable to the order of the Seaboard Citizens National Bank of Norfolk, in the City of Norfolk, Virginia, to be paid at the rate of $66.50 on the 1st of each consecutive month after date, for 24 installments, and which said promissory note purports to be signed by the said Daniel Bigelli and Francis Bigelli, as makers, thereof on the face thereof, which said purported signatures of the said Daniel Bigelli and Francis Bigelli, are forgeries, he, the said James R. Bullock, alias, James Reginald Bullock, at the time, aforesaid, that he did so utter and attempt to employ as true the said last mentioned writing, to-wit, said promissory note, well knowing the said signatures thereon

to be then and there forged, and well knowing the names of said Daniel Bigelli and Francis Bigelli, purporting to be signed thereon as the makers thereof, to be in fact forgeries, and with intent then and there unlawfully ad feloniously to defraud, against the peace and dignity of the Commonwealth of Virginia.

• • •

1950 CODE OF VIRGINIA

Section19.1-259. *Offense against two or more statutes or ordinances.* If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances *shall be a bar to a prosecution or proceeding under the other or others.* Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute. (Code 1950, Section 19-232; 1960, c. 366.) Emphasis added.